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No. 77-736

In the Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK STOCK EXCHANGE, INC., AND INVESTMENT COMPANY INSTITUTE, PETITIONERS

v.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 53a-69a) is reported at 562 F. 2d 736. The opinion of the district court (Pet. App. 32a-51a) is reported at 404 F. Supp. 1091.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1977. A timely petition for rehearing was denied on August 31, 1977 (Pet. App. 70a-71a). The petition for a writ of certiorari was filed on November 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' challenge to letters of the Comptroller of the Currency expressing the opinion that certain conduct would be legal under the Glass-Steagall Act is ripe for judicial review.

STATEMENT

On February 12, 1973, counsel for the Security Pacific National Bank wrote to the Comptroller of the Currency requesting an opinion whether an investment service that the bank desired to establish would violate Sections 16 and 21 of the Glass-Steagall Act, 48 Stat. 184, 189, as amended, 12 U.S.C. 24 (Seventh), 378(a)(1). The bank had proposed to offer an "Automatic Investment Service" (AIS), under which the bank's regular checking account customers would be permitted to purchase stocks from a list of 25 selected securities. The purchases would be paid for by automatic monthly deductions from the customers' checking accounts (Pet. App. 55a).

The Comptroller responded on February 27, 1973, in a brief letter (Pet. App. 1a-2a) stating that the bank's proposed program would be consistent with Sections 16 and 21 of the Glass-Steagall Act, which prohibit banks from selling securities except on order of and for the account of their customers.

Petitioner Investment Company Institute requested the Comptroller to reconsider the legality of the AIS proposal. In response to that request, the Comptroller wrote a second letter (Pet. App. 3a-31a), reaffirming the position that the AIS proposal is consistent with the Glass-Steagall Act.

The second letter contained a more complete statement of the Comptroller's views. It stated that Section 16 of the Glass-Steagall Act permits national banks to engage

in "purchasing and selling * * * securities and stock without recourse, solely upon the order, and for the account of, customers * * *" (12 U.S.C. 24 (Seventh)). The Comptroller stated that the Act does not prohibit a bank from advertising its intention to provide an investment service for its customers, nor does it bar the bank from charging a fee for the service. He added that the Comptroller's office was "not unmindful of the potential for abuse," but he concluded that any action to bar banks from instituting services such as the AIS plan should be postponed "until such time as abuse develops" (Pet. App. 30a).

Petitioners then commenced this action in the United States District Court for the District of Columbia, seeking both a declaratory judgment that AIS is unlawful under the Glass-Steagall Act and an injunction requiring the Comptroller to withdraw his June 10, 1974, opinion letter and to refrain from "approving" the operation of AIS by any commercial bank. The Comptroller moved to dismiss, arguing, *inter alia,* that the informal opinion letter is not "final" agency action reviewable under Section 10 of the Administrative Procedure Act, 5 U.S.C. 704. The district court refused to dismiss the case on ripeness grounds, but it granted summary judgment for the Comptroller, holding that AIS, as described in the Comptroller's letter, does not violate the Glass-Steagall Act (Pet. App. 32a-51a).

The court of appeals did not reach the merits. It held, instead, that the Comptroller's opinion letters are not ripe for judicial review. The court observed that: the opinion letters are informal and tentative interpretations rather than formal rules or policy statements; the question addressed by the Comptroller was not "purely legal" in nature but would require resolution of factual issues

before it could conclusively be determined; there is no "direct and immediate impact" on petitioners as the result of the opinion letters (Pet. App. 64a); and, as the parties agreed, petitioners apparently may bring a private action for injunctive relief against any national bank that offers AIS to its customers (*id.* at 65a-67a). Accordingly, the court of appeals remanded the case to the district court with instructions to dismiss the complaint.

ARGUMENT

This case involves the application of well-settled principles of the law of ripeness. There is no dispute about the governing principles; the question is simply whether those principles were correctly applied by the court of appeals in this case. Because ripeness for review is a pragmatic standard turning on the facts of each case (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149-150; *Buckley* v. *Valeo*, 424 U.S. 1, 113-118), the application of the doctrine of ripeness to the facts of this case does not require review by this Court.[1] In any event, the decision of the court of appeals is correct.

In *Abbott Laboratories*, the Court observed that courts rightly hesitate to interfere with administrative determinations unless they "arise in the context of a

[1]Petitioners also have urged this Court to resolve the question whether AIS violates Section 16 of the Glass-Steagall Act (Pet. 6-9). Because of its ruling on the ripeness question the court of appeals did not address this issue. Accordingly, even if this Court should decide that the court of appeals erred in holding that the case is not ripe for review, the Court should not decide a question on which the court of appeals has not had occasion to pass. See *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 156.

controversy 'ripe' for judicial resolution." 387 U.S. at 148. The rationale of the doctrine, the Court stated (387 U.S. at 148-149),

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

In this case, the court of appeals determined both that the issue presented was not fit for judicial decision and that petitioners would not suffer undue hardship if they were denied immediate judicial consideration of that issue.

The Comptroller's opinion letters are not formal rules or policy statements, but instead express only a "tentative * * * interpretative conclusion" (Pet. App. 63a) about the legality of AIS under the Glass-Steagall Act. The Comptroller stated in his second opinion letter that he might change his views if he were presented with evidence that the actual operation of AIS was resulting in the kinds of abuses that the Glass-Steagall Act was intended to prevent. But "unless there is actual or immediate threatened abuse," he concluded, "regulatory prohibitions are not justified" (Pet. App. 30a). Because the Comptroller's opinion letters are only tentative and contemplate further consideration of the legality of AIS in light of further factual development, those opinion letters do not present issues that are well suited for judicial determination under the first branch of the test in *Abbott Laboratories*.

Petitioners have failed to satisfy the second branch of the *Abbott Laboratories* test as well, for they have failed to demonstrate that any substantial hardship would result from the denial of judicial consideration of the views expressed in the Comptroller's opinion letters. Unlike the rules challenged in *Abbott Laboratories*, the Comptroller's letters do not directly affect petitioners, because the Comptroller's views do not impose on them any duty to comply with a regulatory requirement or any risk of suffering serious penalties for non-compliance. See *Bethlehem Steel Corp.* v. *United States Environmental Protection Agency*, 536 F. 2d 156, 163 (C.A. 7). In addition, as all parties agreed (Pet. App. 65a), petitioners apparently could raise their arguments against AIS in a private action for injunctive relief against a bank offering AIS to its customers. Such an action, unlike the instant suit, would provide a distinct factual setting within which the legal issue could properly be addressed. Cf. *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158, 164-165.

Petitioners suggest (Pet. 5 n. 2) that the alternative of litigation against banks offering AIS would burden them with the need to file multiple private actions. Yet if national banks adopt AIS programs patterned on the Security Pacific National Bank's program, a single lawsuit against a single typical bank should serve to resolve the legal issue. If, on the other hand, different banks employ significantly different versions of AIS, that fact would underscore the impropriety of reviewing in this case the Comptroller's abstract opinion letter without the benefit of detailed factual development in a concrete setting. See *Toilet Goods Association, Inc.* v. *Gardner, supra*, 387 U.S. at 164; *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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